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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,

Petitioners,

v.

GROKSTER, LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE THE CONSUMER ELECTRONICS ASSOCIATION, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND THE HOME RECORDING RIGHTS COALITION IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE *AMICI*[1]

In this brief, *amici curiae* the Consumer Electronics Association ("CEA"), the Computer & Communications Industry Association ("CCIA") and the Home Recording Rights Coalition ("HRRC") offer a critical perspective on the "capable of substantial noninfringing use" doctrine (the *"Betamax* doctrine") enunciated in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) ("*Betamax*"). The *Betamax* doctrine stands as the Magna Carta of the Digital Age. It has permitted the development of manifold technologies and devices ranging from VCRs to personal video recorders such as TiVo to computers to digital television and radio to the Internet itself, all of which operate by making multiple copies of information.

CEA is the principal U.S. trade association of the consumer electronics industry, the industry that gave rise to the VCR at issue in *Betamax* and myriad other digital technologies that enrich peoples' lives. CEA represents more than 2,000 manufacturers of consumer electronics devices, computers, and other technologies. CEA members range from some of the largest information technology companies in the world to family-owned, entrepreneurial businesses that design, manufacture and sell a wide variety of innovative digital and analog consumer electronics equipment.

CCIA members come from all sectors of the computer and communications industry. Ranging in size from small entrepreneurial firms to some of the largest companies in the industry, CCIA members employ over half a million workers and generate over $200 billion in annual sales. For 33 years, CCIA has been dedicated to promoting open markets, open systems, open networks and full, fair and open competition. CCIA members believe that intellectual property protection is a

1. The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has written this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

vital component of the innovation dynamic, but that excessive protection can be as harmful as too little. The vigorous competition and interactive dynamic nature of innovation, which are the keys to the success of all technology industries, require a well-balanced system.

The HRRC was founded in 1981, shortly after the Ninth Circuit announced the decision ultimately reversed by this Court in *Betamax*. It is a leading advocacy group dedicated to preserving consumers' rights to use home electronics products for private, noncommercial purposes, including the right to use these products to make lawful fair uses of copyrighted works. The members and supporters of HRRC include consumers, retailers, manufacturers, and professional servicers of consumer electronics products.

Amici believe in strong copyright protection and recognize the important relationship between electronics devices and the commercial content available for use on those devices.[2] At the same time, *amici* are steadfast in their conviction that strong copyright protection does not require the adoption of broad rules, such as those advocated by petitioners, that will suffocate the invention and introduction of new technology. Neither the Copyright Act nor precedent permits such rules. Nothing in this case requires such a rule.

SUMMARY OF ARGUMENT

This case comes to this Court on an interlocutory appeal sought by petitioners and certified by the court below as to only one narrow issue—whether respondents' distribution of the *current* versions of their software constitutes copyright infringement, *vel non*. Notwithstanding petitioners' overstated "question presented" and rhetoric, respondents' alleged past bad

2. Thus, *amici* neither condone nor support any business built "with the specific intent of inducing infringement," to profit from that infringement, Mot. Picture Studio & Recording Co. Pet'rs ("MPRC") Br. 26, by providing technology "knowing full well [it is] used for massive infringement and little or nothing else." *Id.* at 25.

conduct, intent and means of building their businesses are still before the district court, and not before this Court. *Infra*, Part I.

This Court has consistently held that copyright is solely a creature of statute, not the common law, and that the scope of the right, and the available remedies, must be strictly construed. *E.g.*, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834); *Betamax*, 464 U.S. at 430. The need for strict construction is heightened by the fact that the ultimate goal of copyright is to serve the public interest, not the author's private interest, *see, e.g.*, U.S. CONST., art. I, § 8, cl. 8; *Betamax*, 464 U.S. at 429; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). Achieving that goal requires a delicate and "difficult balance between the interests of authors . . . and society's competing interest in the free flow of ideas, information, and commerce." *Betamax*, 464 U.S. at 429. The task of balancing falls to Congress, for only "Congress has the . . . institutional ability to accommodate fully the varied permutations of competing interests." *Id.* at 431. Congress can effect this balance only if courts hew closely to the statute as written. *Infra*, Part III.A.

There is no basis in the Copyright Act to impose liability on one who provides a technology that is capable of substantial noninfringing use. The Copyright Act imposes liability only on those who "do" or "authorize" the violation of one of six specified "exclusive rights" with respect to a copyrighted work. 17 U.S.C. § 106. Petitioners do not contend that respondents "do" any act invading any of these exclusive rights. Nor can they credibly maintain that respondents improperly "authorize" such acts by providing software. *County of Washington v. Gunther*, 452 U.S. 161, 168-69 (1981) ("'authorize'" means to "'empower, to give a right or authority to act'" (citation omitted)). Any other result would run counter to the Copyright Act and to this Court's admonitions that secondary liability under statutory causes of action must be narrowly construed. *Infra* Part III.B.

Moreover, the *Betamax* doctrine has served this nation well. The Digital Age, which has revolutionized the way Americans

express themselves, do business, communicate and even engage in political speech and action, owes its existence to the principle that the copyright monopoly does not control technologies capable of substantial noninfringing use. All digital technologies operate by making copies of millions upon millions of bits. Without *Betamax*, technology inventors and investors would be subject to claims that they are liable for infringement by others and would face potentially ruinous statutory damages. *Infra* Part II.A & B.

These risks are exacerbated because the precise scope of copyrights in the Digital Age remains controversial. Copyright owners of all types and sizes have been quick to challenge any new technology they believe threatens existing business models. This has included efforts to stop the sale of hugely popular products such as digital video recorders and MP3 players, and software that empowers families to skip offensive material in motion pictures, as well as efforts by pornographers to hold Internet search engines and even credit card companies responsible for infringement of their pornography. *Infra* Parts II.C & D.

Petitioners and their supporting *amici* ask this Court to legislate expansive new "federal common law" theories of secondary copyright liability that have no basis in the Copyright Act or *Betamax*. These theories would chill innovation and stifle growth. Conversely, none would serve petitioners' purpose, for any software found to be infringing under petitioners' theories would remain freely available from overseas websites.

Petitioners' "principal use" test and the government's "relative significance" and "commercial viability" tests contravene *Betamax*. That case specifically found that authorized time shifting, a fractional minority use, sufficed to justify the sale of VCRs, without regard to commercial viability. 464 U.S. at 444-47. *Betamax* also makes clear that petitioners' focus on current use is misplaced. History shows that technologies and their uses can change dramatically over time. Nor is there any

precedent or basis for petitioners' proposed, unbounded cause of action for inducement.

Petitioners request that this Court follow the Seventh Circuit's creative enterprise in *In re Aimster*, 334 F.3d 643 (7th Cir. 2003), and require a post hoc analysis of the steps a technology designer *might* have taken to limit infringement. This would create a nightmare for innovators and courts alike. As the government recognizes, the "rule is neither desirable nor supported by precedent." U.S. Br. 19-20 n.3. Moreover, it is flatly inconsistent with the policy expressly adopted by Congress when it considered this very issue in the 1998 Digital Millennium Copyright Act ("DMCA").

The liability that petitioners seek to impose inexorably would eviscerate the *Betamax* doctrine, extend the copyright monopoly beyond protected expression to include control over technology, obligate manufacturers and technology providers to restrict designs of products and services capable of lawful and valuable uses, and chill development of exciting new technologies. If adopted, petitioners' brand of copyright law would yield exactly the opposite result from that mandated by the Constitution—it would *stifle* rather than "promote the Progress of Science and useful Arts."

ARGUMENT

I. THE ONLY QUESTION BEFORE THIS COURT IS WHETHER PROVIDING A TECHNOLOGY CAPABLE OF SUBSTANTIAL NONINFRINGING USE CONSTITUTES INFRINGEMENT.

This case comes to this Court on petitioners' appeal of an interlocutory order directing entry of partial final judgment under FED. R. CIV. P. 54(b) and a certification under 28 U.S.C. § 1292(b) on only one narrow issue—whether the distribution of respondents' current versions of their software constitutes copyright infringement. *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1033 (C.D. Cal. 2003) ("the Court at this time considers only whether the *current versions* of Grokster's and StreamCast's products and services subject either party to

liability"); Order Certifying Apr. 25, 2003 Order for Immediate Appeal, at 3, *MGM Studios, Inc. v. Grokster, Ltd.*, No. CV 01-08541-SVW (C.D. Cal. filed June 18, 2003) ("Plaintiffs' copyright claims as they apply to present versus past conduct are factually (and, potentially, legally) distinct"); *id.* at 8-9 (Apr. 25 Order did not reach liability issues "'arising from *past* versions of their software, or from other past activities'"). Further, petitioners have cited little, if any, bad conduct tied to distribution of the current software. Thus, all that is at issue is the distribution of the current software.

Despite their strategic decision to pursue this limited interlocutory appeal, petitioners now urge this Court to consider respondents' alleged *past* bad conduct, bad intent and their unlawful building of businesses based on infringement. Those issues are pending in the district court and *are not before this Court*.[3] The district court retains jurisdiction to determine the appropriate scope of forward-looking equitable relief if past wrongful conduct is shown.

Petitioners have grossly overstated the question presented in their Petition for Certiorari and opening briefs. Nothing in the Ninth Circuit's decision purports to "immunize[] [respondents] from copyright liability." MPRC Br. i. This Court should not change settled law, create a cause of action not recognized by Congress, and place the growth of the entire digital economy at risk on the basis of an undeveloped record and overstated and erroneous concerns—not properly before this Court—that bad actors may escape liability.

3. *Cf.* 28 U.S.C. § 1254(l) (permitting extraordinary grant of cert. petition before judgment only as to cases pending in the *courts of appeals*).

II. THE *BETAMAX* DOCTRINE IS THE FOUNDATION OF THIS NATION'S EXPLOSIVE TECHNOLOGICAL GROWTH OVER THE LAST TWENTY YEARS AND IS PARTICULARLY CRITICAL TO NEW DIGITAL TECHNOLOGIES.

Since the *Betamax* decision, this nation has experienced a transformation in the way its citizens express themselves, do business, communicate, experience the world and preserve their memories. That transformation is a direct result of huge investments in resources, energy and creativity in digital technology. No success story has been more important to the public or the economy in the past twenty years.[4]

It is no overstatement to say that the Digital Age owes its existence to the *Betamax* doctrine. Thus, while the technology sector is speaking before this Court with numerous voices that have filed *amicus* briefs with various captions, *the message across the entire sector is the same*: The technology industries are united in their views that the *Betamax* doctrine must be upheld and not weakened.[5]

4. The U.S. information technology sector accounts for more than $500 billion in domestic sales (more than $1 trillion worldwide) and generates a huge portion of the nation's GDP growth. Business Software Alliance ("BSA") Br. 4 & n.5. "The economic significance of the technology sector to the United States economy vastly exceeds the contributions of the content industries." Peter S. Menell, Symposium, *IV. Can Our Current Conception of Copyright Law Survive the Internet Age?*, 46 N.Y.L. SCH. L. REV. 63, 168 & n.368 (2002) (The consumer electronics industry alone "is several times larger than the music and film industries combined.").

5. Tech sector briefs in support of *Betamax* have been filed "in support of petitioners," BSA Br., and "in support of neither party," Digital Media Ass'n *et al.* ("DiMa") Br.; IEEE-USA Br. Numerous briefs, in addition to this one, are being filed "in support of affirmance," *e.g.*, Internet *Amici* Br. All of these parties also agree that (i) "capable of substantial noninfringing use" does not mean "primary use," *infra* Part IV.A, and (ii) requiring a post-hoc analysis of steps that the technology provider might have taken to minimize infringement would destroy innovation and is contrary to law, *infra* Part IV.D.

A. Digital Technology Operates by Making, Manipulating and Moving Copies.

All digital technologies operate by making copies of millions of digital bits of information. This is obvious in the case of devices such as digital cameras, digital video recorders,[6] portable MP3 players, like the Rio and iPod, and digital audio recording media such as recordable compact discs. Personal computers are, similarly, enormous copying machines with immense storage capacity. Nearly every major institution and enterprise depends upon digital infrastructures and computer networks that copy and store information. Other digital products and services, including digital television and satellite radio, rely upon copying less obviously but just as extensively, through buffering and other routine operations.

The Internet itself also operates by copying undifferentiated and often unidentified binary data. Every piece of information that a person encounters while browsing the Internet is copied both in the random access memory and on the hard drive of that person's computer. The bits are moved using "store and forward" technology that literally copies them in multiple servers and routers in the course of transmission. In other words, digital copying technology is responsible for what this Court described as "a unique and wholly new medium of worldwide human communication," and a "new marketplace of ideas" containing "vast democratic forums," from which "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 850, 868, 870, 885 (1997).

Each of these technologies promotes "the Progress of Science." U.S. CONST. art. I, § 8, cl. 8. Indeed, they most directly serve a core interest of copyright—the "interest in the free flow of ideas, information, and commerce," *Betamax*, 464 U.S. at 429,

6. The digital video recorder has so changed how the public experiences television that the Chairman of the FCC described the pioneering TiVo as "God's Machine." Jim Krane, *FCC's Powell Declares TiVo 'God's Machine,'* TULSA WORLD, Jan. 11, 2003, at E3.

and "the purpose of enriching the general public through access to creative works," *Fogerty*, 510 U.S. at 527—providing the very means by which information flow and access are provided.

B. Without *Betamax*, Copyright Law Would Create the Risk of Massive Liability for Almost Every Participant in Our Digital Economy.

Without the *Betamax* doctrine, each of these technologies would be subject to claims that it "promotes," "contributes to," "benefits from" or even "induces" infringement. Technology developers would face massive liability should any such claim succeed. The Copyright Act provides for statutory damages of up to $30,000 *per infringed work* with a mandatory minimum of $750 per work for even ordinary, non-willful infringement.[7] When technologies are capable of handling thousands or tens of thousands of separate works, even the mandatory minimum can quickly become ruinous.[8] Congress carefully calibrated the unique remedies available in copyright law to deter direct infringement; they are not designed to penalize legitimate technological innovation.[9]

7. 17 U.S.C. § 504(c). The per-work maximum for willful infringement is $150,000. *Id.* This discussion highlights two of many fundamental errors in the brief of the economics professors. Kenneth J. Arrow *et al.* ("Economists'") Br. They acknowledge that where "penalties can be raised such that the low likelihood of prosecution can be offset by high penalties[,] . . . direct deterrence will work and indirect liability is therefore unnecessary and likely unwise." *Id.* at 5. But that is precisely the basis of copyright statutory damages. Second, there is no legal ground for their suggestion, *id.* at 10, that a court can, in cases of secondary liability, award only injunctive relief and not statutory damages.

8. *See, e.g., UMG Recordings, Inc. v. MP3.com, Inc.*, 56 U.S.P.Q.2d 1376, 1381 (S.D.N.Y. 2000) (awarding $25,000 per work for thousands of works "copied" in connection with service, without demonstration of injury). These damages forced MP3.com to sell itself to one of the plaintiffs. Brad King, *MP3.com Goes Universal*, WIRED NEWS (May 25, 2001), http://www.wired.com/news/mp3/0,1285,43972,00.html.

9. *See, e.g.*, H.R. REP. No. 106-216, at 3 (1999) (statutory damages increased to deter "computer users" who "believe that they will not be

(Cont'd)

C. Copyright Owners Have a Long History of Exploiting Uncertainties in Copyright Law To Attack New Technologies.

Worse yet, the precise scope of copyright rights vis-à-vis the innovative products and services of the Digital Age remains subject to uncertainty and controversy. Copyright owners have been quick to challenge digital technologies that facilitate arguably lawful uses they dislike. The fair use doctrine, 17 U.S.C. § 107, has been under constant attack. Moreover, these challenges have not been limited to distribution technologies; they include attacks on technologies that facilitate private conduct relating to lawfully acquired content.

Starting in the mid-eighties, copyright owners delayed for years the introduction of digital audio tape technology using lobbying and lawsuits.[10] The impasse was broken only after lengthy negotiations among electronics manufacturers and copyright owners resulted in the Audio Home Recording Act of 1992 ("AHRA"), which immunized from suit the sale and use of digital audio recording devices and separately imposed a duty to use a specific copy limitation technology.

In 1999, copyright owners tried to enjoin the manufacture and sale of MP3 players, now among the most popular new consumer electronics devices on the market. The recording industry's trade association (RIAA) sued Diamond Multimedia over the company's Rio product, an early portable MP3 player. *RIAA v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999). RIAA asserted that demand for these devices would be non-existent without infringement and maintained that the

(Cont'd)
caught or prosecuted" and "individuals" who use "new technology" to store massive amounts of material and create perfect copies).

10. *See* Jocelyn Dabeau & William Fisher, *The DAT Controversy*, *at* http://www.law.harvard.edu/faculty/tfisher/musicDAT.html (visited Feb. 28, 2005); H.R. REP. No. 102-873, at 9-10 (1992); Complaint, *Cahn v. Sony Corp. of Am.*, No. 90 civ. 4537 (S.D.N.Y. filed July 9, 1990).

devices had to be redesigned to comply with the AHRA. *Id.* at 1075. The Ninth Circuit disagreed, holding that MP3 players were not subject to the AHRA and noting with foresight that the popularity of the devices was driven in part by a "burgeoning" legitimate trade in Internet music. *Id.* at 1074, 1081.

In 2001, seeking to narrow *Betamax*, the movie industry attacked DVRs, separately challenging both their consumer-friendly storage and indexing capabilities as well as features facilitating the skipping of material and permitting remote access.[11] The defendants, ReplayTV and its parent, could not afford to defend themselves and were forced into bankruptcy.[12]

The movie industry more recently has targeted Clearplay, which provides software that allows viewers to skip violent or sexual content when watching DVDs at home. Even though Clearplay's software resides on the playback device, is entirely user-driven and does not copy or alter the underlying DVD in any way, the industry has asserted various infringement theories. Mot. Picture Studio Defs. Stmts. Clarifying Claims, *Huntsman v. Soderbergh*, No. 02-M-1662 (D. Colo. Mar. 11, 2003). Similar content provider efforts to block and force modifications to new technologies, such as the TiVo and Digital Audio Broadcasting, are well documented. *See* Internet *Amici* Br. Part II.

Attacks on technology are not limited to the major record or movie companies. Non-mainstream copyright owners and

11. MGM Compl. ¶¶ 24-25, *MGM Studios, Inc. v. ReplayTV, Inc.*, No. 01-09801 (C.D. Cal. Nov. 14, 2001) (including separate allegations related to seeking, recording, sorting, and storage as "inducement" to infringement); Time Warner Compl., *id.* (Nov. 9, 2001).

12. *See* Benny Evangelista, *Piracy Suits Chill Valley, Moves Peril Profit, Techies Say*, SAN FRANCISCO CHRONICLE, Feb. 20, 2003 ("Sonicblue Chief Executive Officer Greg Ballard said his company is spending $3 million per quarter on legal fees to defend itself [in the ReplayTV case]. Ballard said the legal costs are in turn preventing Sonicblue from hiring about 120 employees who could drive future innovations for the company.").

individuals also push to expand the limits of copyright protection at the expense of innovation.[13]

These challenges are only the latest in a long history of misguided attempts by copyright owners to stifle or control new technology. *See MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1167 (9th Cir. 2004) (referencing history of attacks on the player piano, photocopier, tape recorder, etc.). In most cases, the federal courts have rejected these requests for judicial legislation.

D. The *Betamax* Doctrine Is Essential To Protect Innovation.

Innovation is inherently risky and requires substantial capital investment. Such risks will not be taken in an environment where market uncertainties are compounded by the threat of suit and possible massive statutory liability even if the innovation is successful, and even if the use that is fostered is lawful. *See* Menell, *supra* note 4, at 160-61 (recounting how after Napster, "venture capitalists became increasingly wary of the legal costs, economic risk, and potential vicarious liability associated with investing in these ventures").[14] Investment has

13. *See, e.g.*, Compl., *Perfect 10, Inc. v. Google, Inc.*, No. 04-9484 (C.D. Cal. filed Nov. 19, 2004) (pornography copyright owner suing Internet search engine for providing links to allegedly infringing works); *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, No. C-04-0371, 2004 WL 1773349 (N.D. Cal. Aug. 5) (suit against credit card companies used by allegedly infringing website operators); *Ellison v. Robertson*, 357 F.3d 1072, 1074 (9th Cir. 2004) (author suit against AOL for copies of works stored by third-party user); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (photographer suit against search engine for display of search results).

14. Ironically, Professor Menell seeks to increase the chilling effect he recognizes in his academic writing by advocating an unpredictable "comprehensive balancing test" that would expand secondary liability. Professors Peter S. Menell *et al.* Br. This test proceeds from two false premises. First, the professors posit separate worlds of "patented" and "copyrighted" goods, as if the two were unrelated. Menell himself recognizes an "inherent conflict" as "regulating digital devices in the (Cont'd)

been further chilled by some copyright owners' attacks on not only the innovators, but also the investors, advisors, and even attorneys associated with the new technology. *See id.* at 160-61 (citing suits against officers, directors, and venture capitalists involved in Napster and MP3.com's attorneys).

The *Betamax* doctrine fulfills this Court's admonition that for copyright to enrich the public through access to creativity, it must achieve a delicate and "difficult balance between the interests of authors . . . and society's competing interest in the free flow of ideas, information and commerce." *Betamax*, 464 U.S. at 427. As a result, it has permitted the most creative minds to innovate, contributing billions of dollars to the economy, and enormous benefits to society. The *Betamax* doctrine should not be altered.

III. THE COPYRIGHT ACT FORECLOSES JUDICIAL ABROGATION OF THE *BETAMAX* DOCTRINE.

A. Copyright Is a Carefully Balanced, Statutory Right Intended To Serve the Public Interest that Should Not Be Judicially Expanded.

From the very first, this Court has consistently held that a copyright is solely a creature of statute, not the common law or any theory of natural or moral right, and that the scope of the right is strictly limited by the statutory grant. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834) (holding that the right "does not exist at common law—it originated, if at all, under the acts of congress" and remanding for determination of whether all statutory conditions were satisfied); *White-Smith*

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name of content protection hinders progress of digital technology." Menell, *supra* note 4, at 197. Second, they posit that the AHRA, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified at 17 U.S.C. §§ 1001-1010), and Title I of the DMCA, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 1201-1205), were congressional elaborations of copyright liability, which they emphatically are not. Rather, both create separate causes of action, 17 U.S.C. §§ 1009 & 1203, further demonstrating that when Congress seeks to limit the sale of "dual use" technology, it does so explicitly and narrowly. *See infra* Part IV.E.

Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 15 (1908) ("it is perfectly well settled that the protection given to copyrights in this country is wholly statutory"); *Betamax*, 464 U.S. at 429 n.10 (noting that copyright law "'is not based upon any natural right that the author has,'" and describing the balance between stimulating the producer and "'the evils of the temporary monopoly'" (quoting H.R. REP. No. 2222, 60th Cong., 2d Sess. 7 (1909))); *see* Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC'Y U.S.A. 317, 320-21 (2000) ("From the first case, through the present, the Court has treated copyright law as positive law, the parameters of which are determined by the Congress.").[15]

Moreover, the Court has consistently emphasized that the ultimate goal of copyright is to serve the public interest, not authors' private interests, *see* U.S. CONST., art. I, § 8, cl. 8:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.

Betamax, 464 U.S. at 429; *accord Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."); *Fogerty*, 510 U.S. at 526 ("[T]he policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement."); *id.* at 527 ("Copyright law ultimately serves the purpose of enriching the general public.").

For copyright to enrich the public through access to creative works, "it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Id.* This task

15. Accordingly, the efforts of petitioners and their amici to rely on common law principles are misplaced. *E.g.*, Songwriter & Music Publisher Petrs. ("SW") Br. 10 (relying on common law); *id.* at 14 (secondary copyright liability based on "judicial efforts"); Defenders of Property Rights Br. 7-15 (relying entirely on "common law principles").

is constitutionally assigned to Congress, for only "Congress has the . . . institutional ability to accommodate fully the varied permutations of competing interests." *Betamax*, 464 U.S. at 431.[16] This Court has no mandate to alter that balance. *Cf. Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("[I]t is not our role to alter the delicate balance Congress has labored to achieve.").

B. The Copyright Act Does Not Permit Imposition of Liability for Providing Technology that Is Capable of Substantial Noninfringing Use.

There is no basis in the Copyright Act to impose liability for providing a technology that, though capable of substantial noninfringing use, is used for infringement. Providing such a technology neither "does" nor "authorizes" any of the acts constituting infringement. *See* 17 U.S.C. §§ 106, 501.

The remedies for infringement and the parties liable for infringement are part and parcel of the scope of the copyright itself. As statutory creations defined by Congress, they must be strictly construed. *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889) (rejecting a copyright cause of action that did not strictly meet statutory requirements because "[t]his right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action in Hubbard are only those prescribed by Congress"); *Betamax*, 464 U.S. at 431 ("The remedies for infringement 'are only those prescribed by Congress.'" (quoting *Thompson*, 131 U.S. at 151)).

Recent cases confirm that the availability of secondary liability under statutory causes of action must be narrowly construed. In *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), this Court rejected aiding and abetting liability under section 10(b) of the Securities Exchange Act of 1934, stating that it has "refused to allow 10b-5 challenges to conduct not

16. *See* Hamilton, at 325 (Congress filters views "to arrive at determinations that are supposed to be in the best interest of the polity as a whole" through a process of "compromise and debate"); JESSICA LITMAN, DIGITAL COPYRIGHT 61 (2001) (describing legislative process as accommodation of complex competing interests).

prohibited by the text of the statute." *Id.* at 173. The Court reasoned that "Congress knew how to impose aiding and abetting liability when it chose to do so" and that "[t]he issue . . . is not whether imposing private civil liability on aiders and abetters is good policy but whether aiding and abetting is covered by the statute." *Id.* at 176-77; *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254-55 (1993) (rejecting non-fiduciary liability under ERISA because, despite common law duty, no statutory provision imposed obligations on non-fiduciaries).[17]

The Copyright Act expressly defines an "infringer" of copyright as one "who violates any of the exclusive rights of the copyright owner." 17 U.S.C. § 501(a). The exclusive rights are defined as the rights "to do or to authorize" six specific activities with respect to a copyrighted work, the most relevant here being reproduction and distribution to the public. *Id.* § 106.

Respondents do not themselves actually "do" the acts of reproduction or distribution to the public of petitioners' works. Indeed, no petitioner here advances a claim that respondents are liable as direct infringers. MPRC Br. 23, 42 (asserting claims of contributory and vicarious liability); SW Br. 10 (asserting secondary liability).

Nor can it reasonably be argued that providing a technology that is capable of substantial noninfringing use "authorizes" infringement. The plain meaning of the term denotes an intentional action to communicate approval for an act under color of right. From 1968 through 1990, including 1976, when the Copyright Act was passed, Black's Law Dictionary defined "authorize" as "[t]o empower, to give a right or authority to act," commenting that "it has a mandatory effect or meaning

17. This narrow view of secondary liability is consistent with the Court's general hostility toward implying congressional action where the statute is silent. *See Corr. Servs. Corp. v. Molesko*, 534 U.S. 61, 67 n. 3 (2001) (Court has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one" (citing cases)).

implying a direction to act."[18] This Court has agreed, relying on Black's to hold, under Title VII, that "authorize" requires an affirmative grant of right. *Gunther*, 452 U.S. at 168-69 (quoting Black's Law Dictionary (5th ed. 1979)); *accord Confederated Salish & Kootenai Tribes v. United States*, 343 F.3d 1193, 1196 (9th Cir. 2003) ("[A]uthorize" means "to endow with authority or effective legal power, warrant, or right"); *Int'l Union v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1100 (3d Cir. 1980) (relying on dictionary definitions to ascertain the "plain language" of the statutory term and explaining that "[n]ormally the term 'authorized' is used to describe something that is endorsed or expressly permitted and not . . . something which is merely not prohibited").

This Court in *Betamax* faithfully adhered to this statutory limitation on infringement liability, observing that secondary liability exists where "the 'contributory' infringer was in a position to control the use of copyrighted works by others *and had authorized the use* without permission from the copyright owner." *Betamax*, 464 U.S. at 437 (emphasis added); *id.* at 435 n.17 (noting liability for one who "authorizes the use of a copyrighted work"). The Court analyzed the only case in which it has upheld the imposition of secondary copyright liability, *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911),[19] emphasizing

18. Black's Law Dict. 133-34 (6th ed. 1990); Black's Law Dict. 122 (5th ed. 1979); Black's Law Dict. 169 (4th ed. 1968). The definitions also say, in the same vein, "[t]o clothe with authority, warrant, or legal power. . . . To permit a thing to be done in the future." *E.g.*, Black's Law Dict. 169 (4th ed. 1968). The current definition is to the same effect, but shorter: "to give legal authority; to empower" and "to formally approve; to sanction." Black's Law Dict. 143 (8th ed. 1999). This Court considers ordinary dictionary definitions in statutory construction. *See, e.g., County of Washington v. Gunther*, 452 U.S. 161, 168-69 (1981) (citing Black's Law Dict.); *Muscarello v. United States*, 524 U.S. 125, 127-31 (1998) (citing dictionaries and other sources).

19. The fact pattern of *Kalem* also is the only example provided in the only passage in the Committee Reports of the 1976 Copyright Act explaining the meaning of "to authorize":

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that the producer "*had authorized* [the infringing] *use* by his sale of the film to jobbers" where that use "was not his to authorize." *Betamax*, 464 U.S. at 436 (emphasis added). In fact, the producer created the film and distributed it with the express, advertised purpose that it be used for infringing performances. *Id.* at 435-36.

The authorization found in *Kalem* bears no resemblance to the provision of a technology capable of substantial noninfringing use, as the Court made clear in *Betamax*. *Id.* at 437 (describing the theory of liability asserted against the Betamax as "novel"); *id.* at 436 (attempt to equate two circumstances is "a gross generalization that cannot withstand

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> Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

H.R. REP. NO. 94-1476, at 61 (1976); S. REP. NO. 94-473, at 57 (1975) (quoting same language); S. REP. NO. 93-983, at 111 (1974) (quoting essentially same language). The addition of the words "to authorize" and this explanation were new to the 1976 Act. Contrary to petitioners' claim (MPRC Br. 21 n.15), they thus provide no evidence of broad ratification of particular doctrines of secondary liability, and certainly do not evidence expansion of those doctrines or its application to the provision of technology. The 1998 DMCA could not ratify broad doctrines of secondary liability, as it did not reenact copyright liability. Petitioners cite section 1201(c)(2), which simply says that section 1201, in defining a new non-infringement cause of action, should not be construed to affect copyright infringement liability related to technology. If it ratifies anything, it ratifies the *Betamax* doctrine. The various defenses and exceptions cited by petitioners similarly do not evidence the existence of liability. As Senator Hatch recently stated, "[I]ndeed, the Copyright Act contains literally scores of similar exemptions, and none of those exemptions have been or should be construed to imply anything about the legality of conduct falling outside their scope." 151 CONG. REC. S482 (daily ed. Jan. 25, 2005).

scrutiny"). As this Court found in *Betamax*, providing a technology does not "authorize" the use of that technology to violate any right of a copyright owner.[20] It is not infringement.

C. The *Betamax* Doctrine Applies Regardless of Whether Secondary Copyright Liability Is Labeled "Contributory" or "Vicarious."

From the foregoing, it is clear that the *Betamax* doctrine applies regardless of whether secondary liability is labeled "contributory" or "vicarious," even assuming that vicarious liability extends beyond its only doctrinal underpinnings in the concept of *respondeat superior*. Copyright liability simply does not, by statute, extend to the situation at issue in *Betamax*—regardless of the label applied. As this Court recognized in *Betamax*, distinctions between "contributory" and "vicarious" liability "are not clearly drawn" and "analysis of respondents' unprecedented contributory infringement claim necessarily entails consideration of arguments and case law which may also be forwarded under the other labels." 464 U.S. at 435 n.17.

Similarly, the Ninth Circuit's view that the *Betamax* doctrine is limited to the issue of whether a defendant has constructive

20. In the years since *Betamax*, some lower federal courts have strayed far from the statutory mandate in construing the scope of secondary copyright liability. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) ("support services" such as parking and utilities distinguish swap meet operator from landlord and are "material contribution"); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1375, 1376 (N.D. Cal. 1995) (providing access to computer system used to infringe is material contribution; control for vicarious liability can be theoretical and indirect, based on contractual relationship with BBS operator rather than direct infringer); *Ellison*, 357 F.3d at 1078 (AOL's "knowledge" imputed from one email it never received, and "material contribution" was automated copying incidental to Usenet access); *id.* at 1078-79 (For vicarious liability, there is "no requirement that the draw be 'substantial.' . . . The essential aspect . . . is whether there is a causal relationship between the [infringement] and any financial benefit."). Far from adopting petitioners' broad and untested "common law" tests, this Court should rein in concepts of secondary liability to accord more directly with the statutory language.

knowledge, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2002), is incorrect. The *Betamax* doctrine is not tied to the state of defendants' knowledge; rather, it is based on the public's interest in access to technology. 464 U.S. at 440-42. The Ninth Circuit stands alone in this erroneous view. *E.g.*, *Aimster*, 334 F.3d at 649 (rejecting Ninth Circuit view); 2 PAUL GOLDSTEIN, COPYRIGHT § 6.1.2, at 6:12-1 (2d ed. 2003) ("The substantial noninfringing use doctrine serves a purpose entirely separate from the knowledge requirement."). Thus, petitioners' attack on the knowledge standard applied by the Ninth Circuit, MPRC Br. 38-41, is pointless. The *Betamax* doctrine does not depend on lack of knowledge.

IV. PETITIONERS' THEORIES FOR IMPOSING SECONDARY LIABILITY AND LIMITING *BETAMAX* ARE AN IMPROPER INVITATION TO JUDICIAL LEGISLATION.

Although the question presented is narrow, the relief sought by petitioners reaches far beyond whether distribution of a particular version of software constitutes infringement. Petitioners propose numerous wide-ranging expansions of secondary liability and weakening of the *Betamax* standard. Any such change will have adverse effects throughout the economy.

The short answer to petitioners' proposals is that each would create a cause of action for copyright infringement that simply is not found in the Copyright Act. *See supra* Part III. Petitioners' request for judicial legislation should be rejected.

Petitioners' proposed causes of action inevitably also would destroy any demarcation of the boundaries between lawful and unlawful conduct that this Court found "peculiarly important." *Fogerty*, 510 U.S. at 527. They would give a multitude of copyright owners "effective control over" digital technology and "block the wheels of commerce." *Betamax*, 464 U.S. at 441.

Nor would these free-floating doctrines of secondary liability have the beneficial effect petitioners seek. Peer-to-peer software would remain freely available to would-be infringers through off-shore websites beyond the reach of U.S. copyright

law. As this Court recognized last term, laws regulating conduct on the Internet tend to be ineffective "because providers of the materials covered by the statute can simply move their operations overseas." *Ashcroft v. ACLU*, __ U.S. __, 124 S. Ct. 2783, 2786 (2004). The predictable effect of weakening the *Betamax* doctrine will be that those who wish to defy the Court's ruling will simply move offshore, while legitimate U.S. technology companies, with millions of employees in the United States, who wish to comply with the law, will be burdened with enormous new litigation risks.

A. Petitioners' "Principal Use" Standard and the United States' "Relative Significance" Test Are Foreclosed by *Betamax*.

Petitioners ask this Court to rewrite the *Betamax* doctrine so that it would "not apply when the primary or principal use of a product or service is infringing." MPRC Br. 31. Petitioners argue that where the primary current use of a technology is infringement, the provider of that technology is not "engaged in 'substantially unrelated' commerce," *id.*, and invoke the "economic philosophy behind the [copyright] clause," *id.* Economic philosophy notwithstanding, neither *Betamax*, nor the patent law doctrine on which the *Betamax* doctrine was based, supports such a construction.

Betamax made crystal clear that a technology provider cannot be secondarily liable for infringement based on others' infringing uses so long as the technology is "merely ... capable of substantial noninfringing uses." 464 U.S. at 442. The Court described the doctrine's patent law roots, observing that in that context, the rule properly causes courts to "deny the patentee any right to control the distribution of unpatented articles unless they are *unsuited for any commercial noninfringing use*" and that "the *item must almost be uniquely suited as a component of the patented invention.*" *Id.* at 441 (emphasis added). The Court further recognized that the doctrine reflects "the critical importance of not allowing the patentee to extend his monopoly beyond the limits of his specific grant." *Id.* This has even greater

force in copyright, where the standard of protection is simple originality and not novelty and nonobviousness, *compare* 17 U.S.C. § 102, *with* 35 U.S.C. §§ 102(a), 103, and rights exist automatically in a vast array of works, with no examination by the government, *see* 17 U.S.C. § 102.

The United States similarly ignores the plain language of *Betamax* and the genesis of the "capable of substantial noninfringing use" standard. Instead, the government concocts a novel, multi-factor test, nowhere found in *Betamax*, that depends upon the "Relative Significance of the Infringing and Noninfringing Uses." U.S. Br. 14-17.

The United States starts from the erroneous premise that *Betamax* implicitly found that authorized time shifting was not "substantial noninfringing use" and thus found it "necessary" to consider whether unauthorized time shifting was fair use. *Id.* at 12. In fact, the Court's opinion belies this argument. The Court credited the district court's finding that "the evidence concerning 'sports, religious, educational, and other programming' was sufficient to establish a significant quantity of broadcast programming whose copying is now authorized, and a significant potential for future authorized copying." 464 U.S. at 444. After discussing the evidence on authorized time shifting, the Court concluded:

> If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as *Mister Rogers' Neighborhood*, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works.

Id. at 446-47 (concluding that seller of equipment "cannot be a contributory infringer"). This language can only be read as an unqualified conclusion that the Court deemed authorized time shifting to be a sufficient "substantial noninfringing use."[21] *See also id.* at 444 (it would be "'extremely harsh'" to deprive the public of a tool "'capable of some noninfringing use'" (quoting 480 F. Supp. at 468)).

B. Petitioners Are Incorrect To Focus on Current Uses of a Technology.

Petitioners also are incorrect in their focus on current uses. *Betamax* makes clear that a technology need not *currently* be used for legitimate purposes, but must simply be "capable" of legitimate uses, necessarily including uses that may only be future or potential uses. 464 U.S. at 442.

The uses of technology change over time, as the VCR example vividly demonstrates. Despite the cries of the movie industry when the VCR was introduced, the technology proved to be very lucrative for the studios as more and more people used the devices to watch rented and purchased videotapes.[22] Only three years after the *Betamax* decision, "home video had become the industry's chief revenue source. This market was . . . providing distributors with about $2 billion and outstripping theatrical revenues ($1.6 billion)."[23]

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21. This conclusion similarly dooms the argument of the United States (at 17-21) that, if the principal use of a technology is infringement, courts must look to "subsidiary indicia." *See also infra* Part VI.E, discussing the error of the "steps taken to discourage infringing uses" indicium.

22. The product likely would not have had the same success in the marketplace without the record function. *See, e.g.*, William Bowen, *How the Japanese Won the VCR Wars*, FORTUNE, June 8, 1987, at 163 (describing how VCR prevailed over laser discs because it could both play pre-recorded material and record).

23. Jennifor Holt, *In Deregulation We Trust: The Synergy of Politics and Industry in Reagan-era Hollywood*, FILM QUARTERLY (Winter 2001) (citation omitted), http://www.findarticles.com/p/articles/mi_m1070/is_2_55/ai_83477537. Fourteen years later, one author noted that "[d]espite the ubiquity of VCRs, more people go to the movies than ever, and videocassette rentals and sales account for more than half of

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The tremendous windfall that the VCR provided to the movie industry demonstrates the folly banning or restricting the use of new technologies based on early usage patterns. As technologies evolve, and as content providers find new ways to work with them, it is inevitable that the public's use of the technologies also will change. The recent success of iTunes and other legitimate music sites shows that even in the context of digital distribution, uses evolve as content providers, manufacturers, and distributors probe the best ways to exploit new technologies and markets. Giving copyright owners a veto over the development of technology early in its evolution, based on early misuse, would cause untold harm to the development of new arts and sciences, and would ultimately damage both the public and the copyright owners themselves.

C. The United States' Focus on Respondents' Business and "Commercial Viability" Misconstrues the *Betamax* Standard.

The United States argues (at 13) that the "capable of substantial noninfringing use" standard must be considered in light of the "defendant's particular business." It also argues (at 11) that the proper test is "commercial viability." Like the government's "relative significance" test, these arguments cannot survive an examination of *Betamax*'s discussion of authorized time shifting. Nowhere in *Betamax* does the Court consider whether consumers would have purchased the Betamax in order to record sports or *Mister Rogers' Neighborhood* or, for that matter, whether the product would have been viable based on noninfringing uses.[24]

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Hollywood's revenues." John Perry Barlow, *The Next Economy of Ideas*, WIRED, Oct. 2000, http://www.wired.com/wired/archive/8.10/download_pr.html.

24. Curiously, the United States relies on the *Betamax* dissent to create its "commercial viability" standard. U.S. Br. 11. Of course, the dissent was not the majority. But the United States even misreads the dissent. The full passage cited by the United States states that "[i]f virtually (Cont'd)

Moreover, a standard based on commercial viability is neither administrable nor consistent with the United States' concession that "where noninfringing uses predominate, plaintiffs will not prevail." U.S. Br. 17. Viability of a product will depend on complex analysis of diverse economic factors, including costs, revenues, and returns on investment, an analysis that can change significantly and unpredictably over the lifetime of a product. Nothing in *Betamax* suggests that courts are required to make (let alone institutionally capable of making) that analysis. Attempting to predict a product's future markets, assigning an internal rate of return, and predicting future profitability are not normal enterprises for Article III judges.

The standard also would turn *Betamax* on its head. It may well be, for example, that a technology with overwhelmingly noninfringing use is only marginally profitable, and that some incidental infringing use is enough to sustain the product. Such a product would fail the United States' viability test, depriving the technology to the vast majority of noninfringing users.[25]

D. Providing a Technology that Is Capable of Substantial Noninfringing Use Is Not Inducement.

In their effort to avoid the *Betamax* doctrine, petitioners argue that it does not apply where defendants have "intentionally facilitated and actively encouraged and assisted infringement." MPRC Br. 27. This argument fails for two reasons. First, the lower courts found no such conduct in connection with the

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all of the product's use, however, is to infringe, contributory liability may be imposed; if no one would buy the product for noninfringing purposes alone, it is clear that the manufacturer is purposely profiting from the infringement, and that liability is appropriately imposed." 464 U.S. at 491 (Blackmun, J., dissenting). A requirement that "*no one would buy the product* for noninfringing purposes alone" is very different from a standard of "commercial viability."

25. Similarly, the United States' repeated references (at 8, 14, 17) to whether the "draw" of a product is infringement does not advance the analysis, as it says nothing about how much of a "draw" is required. In *Ellison*, 357 F.3d at 1079, the Ninth Circuit found even an insubstantial draw to give rise to vicarious liability. *See supra* note 20.

distribution of the current version of the respondents' software. *See, e.g., MGM Studios*, 259 F. Supp. 2d at 1041-43. Thus, either petitioners are relying on conduct related to prior versions of the software, or they are relying on the distribution of the software itself. As discussed in Part I, *supra*, conduct related to prior versions of the software is not the subject of this appeal. If petitioners are relying on the distribution of the software itself, there is no way to distinguish this case from *Betamax*. Petitioners' exception would swallow the rule.

Second, despite dicta in one copyright case that has been formulaically restated in later decisions, *see Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971), petitioners have not cited to any case in which infringement liability has been imposed on the basis of "inducement." In other words, there is no such doctrine, which is why Congress has been working on creating one. *See* Internet *Amici* Br. Part III.

Nor should this Court create it. Even if this were an appropriate case to opine about inducement (which it is not), petitioners' proposed doctrine has no practical bounds. Petitioners cite the patent law doctrine of inducement, describing it as "encompass[ing] a wide range of conduct. . . including licensing, repair and maintenance, design, instruction and advertising." MPRC Br. 28-29 n.18. Maintenance, design, repair and instruction are normal incidents of providing technology. Moreover, inducement under the patent law requires a specific intent to cause the infringement of a particular known patent. *Manville Sales Corp. v. Paramount Sys. Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990). Petitioners can show no such intent here on the limited record before this Court.

E. There Is No Duty To Design Technologies To Minimize the Possibility of Infringement.

Petitioners ask this Court to turn the law of secondary copyright liability into a more generalized duty on the part of respondents—and all consumer electronics, information technology, and telecommunications companies as well—to

have the interests of copyright owners rather than consumers uppermost in their minds when making design decisions. *See* MPRC Br. 33-34, 38-41. This is not a novel demand. The movie companies made the same demand in their challenge to the Betamax more than 25 years ago and were rebuffed by the district court. *See Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 462-69 (C.D. Cal. 1979) (rejecting demand that the Betamax's television tuner be eliminated to preclude recording of programs); *see also* 464 U.S. at 494 (Blackmun, J., dissenting) (arguing that Sony "may be able, for example, to build a VTR that enables broadcasters to scramble the signals of individual programs and 'jam' the unauthorized recording of them").[26]

Amici are aware of no case, other than *Aimster*, that has recognized such a theory. In *Aimster*, Judge Posner stated:

> Even when there are noninfringing uses of an Internet file-sharing service . . . if the infringing uses are substantial then to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses.

334 F.3d at 653.

Betamax does not permit such a conclusion, as this Court gave no weight to the studios' arguments that Sony could have redesigned its product to avoid or decrease infringing uses. The United States, for its part, agrees that "such a rule is neither desirable nor supported by precedent," noting that such a rule "would have the undesirable effect of chilling technological innovation and constraining the product development options of developers of software and other digital technologies." U.S. Br. 19-20 n.3. Incongruously, however, and with no more precedent or greater desirability, the United States attempts to

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26. In other words, contrary to petitioners' assertion, MPRC Br. 33-34, the *Betamax* Court did not face an "all-or-nothing" choice.

backdoor the same approach, arguing that steps taken (or not taken) by the technology provider to prevent infringement should be one of three "subsidiary indicia" of whether a technology provider should be liable. *Id.* at 17, 19-21.

Either *Aimster* or the United States' standard would create a nightmare for courts and for inventors and their investors. If technologies reached consumers' hands in such a world, courts would be required to second-guess each design decision. Any copyright owner could present its favorite content protection system and argue that it would have been relatively inexpensive for the technology's creator to adopt it. Courts would be required to perform technical and economic analyses of myriad protection technologies, including various forms of encryption, watermarking, fingerprinting, signaling, digital rights management, and others not yet invented. They also would be required to determine which technologies would be "disproportionately costly" and to consider whether other, less costly means could be employed by either the technology provider or copyright owner. Such a rule would require a court-ordered allocation of resources in every case.

Congress consistently has rejected such efforts by copyright owners to force manufacturers to redesign their technology to implement undefined content protection systems. In fact, the last time Congress passed major legislation relating to copyright, the DMCA, it relieved manufacturers of any burden to design their products to respond to copyright protection schemes that copyright owners might employ. The "no mandate" provision says:

> (3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within

> the prohibitions of [17 U.S.C. § 1201] (a)(2) or (b)(1).

17 U.S.C. § 1201(c)(3).[27] This legislation was passed with the support of respondents and other copyright owners.

As the legislative history makes clear, Congress intended to ensure that manufacturers of technology products would not be under any obligation to design their devices in any particular way. Then-Senator and former Attorney General John Ashcroft, a leader in the development of Section 1201(c)(3), after citing "the reasonable and accustomed home taping practices of consumers recognized in the Supreme Court's [*Betamax*] decision," said:

> It thus should be about as clear as can be to a judge or jury that, unless otherwise specified, nothing in this legislation should be interpreted to limit manufacturers of legitimate products with substantial noninfringing uses – such as VCRs and personal computers – in making fundamental design decision or revisions.

144 CONG. REC. S11887-88 (daily ed. Oct. 8, 1998).[28]

If petitioners' theories are adopted, virtually all digital technologies will be subject both to advance clearance by a small group of content conglomerates and to after-the-fact second guessing by virtually any copyright owner about how the technology was designed and how it is being used.[29] If a

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27. The only exception to this rule was a very narrow, specific mandate applicable to analog videocassette recorders. 17 U.S.C. § 1201(k). That provision contains balanced "encoding rules" that prohibit copyright owners from applying the technology to prevent the recording of certain copyrighted content, including broadcast television and subscription pay satellite and cable channels.

28. These sentiments were also repeatedly expressed in the House of Representatives. *See, e.g.*, 144 CONG. REC. H10621 (daily ed. Oct. 12, 1998) (statement of Rep. Klug); *see also* 144 CONG. REC. E2166 (daily ed. Oct. 14, 1998) (statement of Rep. Boucher); 144 CONG. REC. E2144 (daily ed. Oct 13, 1998) (statement of Rep. Tauzin); 144 CONG. REC. H7094-95 (daily ed. Aug. 4, 1998) (statement of Rep. Bliley).

29. Even under the current law, copyright owners continue to press

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technology provider guesses wrong, it will be subject to potentially ruinous statutory damages. Innovation and investment cannot survive in such an environment.

This Court should reject petitioners' request that it adopt the *Aimster* standard and the United States' suggestion that failure to design technology in the manner sought by content providers is indicative of infringement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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claims based on the failure of innovators to apply favored content protection technology, often trying to prevent lawful uses of content. *See* Internet *Amici* Br. Part II.2 (discussing RIAA's reasons for attacking Diamond's Rio, MPAA's challenge to TiVo's content protection technology, and RIAA's request to the FCC for broad limitations on digital radio).